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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1112

JOSEPH SIMMONS, JR., DAVID SIMMONS, CLARENCE TOUGAW and VIOLA TOUGAW and those similarly situated, APPELLANTS

v.

CHIEF EAGLE SEELATSEE, individually and as Chairman of the Yakima Tribal Council, and the YAKIMA TRIBAL COUNCIL OF THE CONFEDERATED BANDS AND TRIBES OF THE YAKIMA NATION, APPELLEES

UNITED STATES OF AMERICA, INTERVENOR

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(c) of the Revised Rules of this Court, the United States, Intervenor, moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment entered December 6, 1965, by a three-judge court convened in the United States District Court for the Eastern District of Washington, Southern Division, pursuant to 28 U.S.C. 2282.

Joseph Simmons, Sr., an enrolled Yakima Indian, died in 1960, leaving no will. Land had been allotted to him in 1915 by a trust patent under the General Allotment Act of February 8, 1887, Section 5, 24 Stat, 389, as amended, 25 U.S.C. 348. That statute provided that the laws of descent of the State where the land was located should apply thereto (J.S. App. 17-19). An Act of June 25, 1910, 36 Stat. 855, Section 1, as amended, 25 U.S.C. 372, provided that the ascertainment of heirs of an Indian allottee by the Secretary of the Interior should be conclusive. Plaintiffs, the children and grandchildren of Simmons, Sr., are his heirs at law. However, they do not qualify under the Act of August 9, 1946, Section 7, 60 Stat. 969, 25 U.S.C. 607, which provides that henceforth only enrolled Yakima Indians of one-fourth or more blood could inherit allotments within the reservation, with an exception for a surviving spouse. The consequence is that the land will escheat to the Yakima Tribe.[1]

Plaintiffs brought this suit against tribal officials to enjoin enforcement of the 1946 Act on the ground of

[1] The Act of November 24, 1942, 56 Stat. 1021, 25 U.S.C. 373a, provides for escheat to the tribe of allotted Indian lands in case of death intestate without heirs.

unconstitutionality. After various motions and jurisdictional defenses were made (J.S. App. 25-26), the United States intervened, adopting the defendants' position and urging that the Act was constitutional. The district court rejected the jurisdictional defenses but sustained the statute.

ARGUMENT

Appellants' Attack On The Statute Lacks Substance

The plenary control of the United States over Indian affairs needs no restatement. One aspect of Congressional policy in this area has been to preserve tribal identity, and to that end, to maintain the tribal property in the hands of the members of the tribe. The implementation of that policy necessarily involves distinctions based on the quantum of Indian blood and tribal relationship. The statute challenged here is no more than an instance of such traditional regulation.[2]

Appellants point out that all Indian tribes are not governed by the sames rules in this respect. But that is a product of history and differing circumstances. It is enough that all prospective Yakima inheritors of equal blood are accorded equal treatment. Nothing requires that the Yakimas be treated like the Five Civilized Tribes or others.

Nor does the 1946 statute divest vested rights. Appellants themselves seem to recognize that until 1960

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[2] It was not until the 1910 Act that restricted land could be devised and then only with approval. *Federal Indian Law* (G.P.O. 1958), p. 79).

they had "a mere anticipation of heirship" (J.S. App. 31, n. 11). To be sure, they speak of their ancestor's right to devise his property (J.S. 11) and seek to analogize their rights to a treaty recognized right of a tribe (J.S. 7-8). But in the cited cases the United States had diverted tribal property to its own use. Here the tribal restrictions on succession are designed to protect the tribe in its reservation free of undue dilution. Congress is, of course, free to change its policy with respect to the Yakima Indians, as it has been urged to do.[3] That is, however, a matter wholly within the legislative discretion.[4]

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[3] Suggested legislation has been regularly introduced in Congress since that time. See, *e.g.*, H. Rep. No. 1387, 86th Cong., 2d Sess., and a bill is now pending before the House Committee. H.R. 10020, 89th Cong., 1st Sess.

[4] In defending this provision, the Chairman of the Tribal Council suggested other alternatives that would be available prior to death. See Hearings, House Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs on H.R. 4005, 85th Cong., 2d Sess., pp. 40, 47. Those hearings reviewed an intra-tribal dispute about this matter, among other things. Federal courts do not take jurisdiction over such intra-tribal controversies. *Littell* v. *Nakai*, 344 F.2d 486 (C.A. 9), certiorari denied, 382 U.S. 986; *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131 (C.A. 10); *Prairie Band of Pottawatomie Tribe of Indians* v. *Puckkee*, 321 F.2d 767 (C.A. 10); *Martinez* v. *Southern Ute Tribe of Southern Ute Res.*, 249 F.2d 915 (C.A. 10), certiorari denied, 356 U.S. 960.

CONCLUSION

It is submitted the judgment should be affirmed summarily.

Respectfully submitted.

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APRIL 1966.

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